SUPREME COURT, U. S.

No. 763

NOV 22 1968

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# In the Supreme Court of the United States

OCTOBER TERM, A.D. 1968

**BERNHARD ROSEE,**

*Petitioner,*

VS.

**BOARD OF TRADE OF THE CITY OF CHICAGO, an Illinois corporation; JAMES E. BAGGOT, JR., and DONALD W. MORRISON, individually and d/b/a BAGGOT & MORRISON; HARRIS HAYWOOD; SIDNEY C. HAMPER, MARTIN H. MILEK, ROY C. LOFTUS, RICHARD ROSE, RAYMOND COMENZO, and THOMAS HERR, individually and as members of the Committee of Arbitration of the Board of Trade of the City of Chicago; JULIUS MAYER; WILBERT E. HUGE; ROBERT L. DAVID; THOMAS E. HOSTY; ROBERT C. LIEBENOW, individually and as President of the Board of Trade of the City of Chicago; WARREN W. LEBECK, individually and as Secretary of the Board of Trade of the City of Chicago; JAMES J. COUGHLIN; ALBERT W. KIBBY; and SAM GORDON,**

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BERNARD ROSEE, Pro Se.
1260 N. Dearborn Street
Chicago, Illinois 60610
*Petitioner, pro se*

**JURY DEMAND**

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

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*Respondents.*

---

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Bernhard Rosee pro se prays that a Writ of Certiorari issue to review the final judgment of the United States

Court of Appeals for the Seventh Circuit entered May 28, 1968, on which rehearing was denied June 26, 1968.

## OPINIONS BELOW

The one page Opinion of the Court of Appeals dated May 28, 1968, affirming the judgments of the District Court, is quoted in full in the Appendix and Petition for Rehearing denied June 26, 1968.

The Opinion, Judgment and Remanding Order of the District Court of June 13, 1966, are to be found in the Court of Appeals Appendix and Record pages 30-131, inclusive. Due to the precarious financial condition of the Petitioner, Petitioner prays that this Appendix be accepted without reprinting and that 10 copies be permitted to be filed. Neither Opinion is reported in the official reports.

## JURISDICTION

The Judgment of the Court of Appeals was entered on May 28, 1968 and Petition for Rehearing denied June 26, 1968.

The mandate has been stayed on motion of Petitioner pending filing of a petition in this Court. An extension was granted Petitioner by Mr. Justice Thurgood Marshall until November 23, 1968 to file this Petition. Jurisdiction is founded upon 28 U.S.C. Sec. 1254 (1).

The jurisdiction of this Court is predicated upon the following primary grounds:

1. The decision of the Court of Appeals in that it necessarily approved the District Court's Order denying Petitioner's right to make at least one amendment to his original Complaint constitutes a departure from the accepted course of judicial proceedings and is in conflict with

the decisions of this Court and other Courts of Appeal, particularly since Petitioner proposed to add an anti-trust count.

2. The decision of the Court of Appeals in failing to set forth the legal or factual basis for its ruling constitutes a departure from the accepted and usual practice in judicial proceedings.

3. The decision of the Court of Appeals constitutes a further conflict with decisions of this Court and other Courts of Appeal in that it approves the denial by the District Court of Petitioner's right to full discovery. Petitioner was prevented from exercising a non-discretionary right to oppose Defendant's Motion for Summary Judgment.

4. The decision of the Court of Appeals was contrary to decisions of this Court and other Courts of Appeal in that it approved the entry of the Summary Judgment where the District Court conceded dismissal was improper and extensive conflicting questions of fact were inherent in the case.

5. The decision of the Court of Appeals insofar as it approved the deprivation of Petitioner's right to a jury trial decided a federal question in conflict with applicable decisions of this Court.

## QUESTIONS PRESENTED

1. May a trial judge after signing a subpoena duces tecum for the production of all government and other records requested by Petitioner (which order appears in Supplemental Appendix 9 to 12, inclusive), reverse itself and limit discovery to a random selection of three days' filing, all to be examined in camera over the objection of Petitioner? (See Supp. App. Court of Appeals 16-18 inclusive)

2. May the Court after signing an order for the production of records of Defendants deny Petitioner a motion to show cause for the production of such records? (Appendix Court of Appeals 23-24)

3. May the Trial Judge preclude inspection by Plaintiff of such records, thus in effect determining their relevancy alone in camera, without any opportunity for inspection by Plaintiff?

4. Does such conduct on the part of a District Court amount to a denial of the due process of law under the Fifth Amendment?

5. May a District Judge deny Plaintiff a trial by jury in open court so that the jury may be enabled to decide the relevancy of the documents involved, which action is a denial of due process?

6. May the Court take information or testimony in his private chambers from a Government agent (Piala — see Appendix Court of Appeals 123), and deny Petitioner the right to cross examine this agent, Mr. Piala?

7. May a District Judge act arbitrarily when he disregards the importance of The Commodity & Exchange Act passed by Congress for the protection of the public, namely, it is mandatory that each commission merchant must keep daily segregation records as provided in Section 1.32 of the Commodity and Exchange Act? In Appendix 125 Court of Appeals the Court stated: . . . "that cancelled checks were examined, that daily segregation statements were examined . . ." These are the only true and genuine records which could prove Petitioner's case. No other records can be substituted for these, but Petitioner was deprived of these records to establish his innocence.

8. Can a District Court and the Court of Appeals ignore the fact that the Board of Trade sold Petitioner's membership, without a court order, which was his sole means of livelihood, and which action is definitely a violation of the Fifth Amendment?

9. Was the entry of a Summary Judgment in conflict with Rule 56 in view of the inherently complex issues of fact including fraud demonstrated by the District Court's 100-page Opinion and Record?

## PERTINENT STATUTES

Commodity Exchange Act As Amended, 7 U.S.C. 1-17.
28 U.S.C. Sec. 1254 (1).
Title 28 United States Code, Section 1441.
Title 28 United States Code, Section 1442 (a).
Title 28 United States Code, Section 1447.
Title 28 United States Code, Section 1443.
Federal Rule of Civil Procedure 56.

## STATEMENT OF THE CASE

Petitioner, Bernhard Rosee, a member of the Board of Trade of the City of Chicago since 1944, commenced this action on July 15, 1963 in the Circuit Court of Cook County, Illinois, alleging that all of the defendants herein had joined in a conspiracy to 1) wrongfully deprive him of his livelihood and membership in the Board of Trade of the City of Chicago, 2) to falsify certain financial records, and 3), to convert and embezzle funds of the plaintiff to their own use. In pursuance of the aforesaid combination, conspiracy, confederation and agreement as so broadened, said co-conspirators did certain things as set forth in Petitioner's Complaint (App. Court of Appeals 1-16).

The Board is a corporation organized under a special act of the General Assembly of the State of Illinois, approved February 18, 1859. It is the nation's largest and most important agricultural commodity exchange. It is a duly designated contract market under the Commodities Exchange Act, Title 7 U.S.C., Secs. 1-17. Under said Act the Board is subject to extensive regulation and control, both as to its own operations and as to those of its members, by the Secretary of Agriculture and the Commodity Exchange Authority (CEA) empowered to administer the Act for the Secretary. The operations of the Board and its members are also subject to the provisions of the Sherman and Clayton Anti-Trust Acts, 15 U.S.C. Secs. 1 et seq.

The Defendant, A. W. Kibby, was the Chief Accountant of the Chicago office of the Commodity Exchange Authority, hereinafter called "CEA". Subsequently he became an Exchange Supervisor. The Defendant, Sam Gordon, was the Chief Investigator of the Chicago office of the CEA.

On July 29, 1963, on petition of the Department of Justice acting under 28 U.S.C. 1442 (a) and on behalf of Defendants Kibby and Gordon, a petition was filed in the United States District Court for the Northern District of Illinois to remove such cause from the state to the federal courts. The motion claimed such defendants had acted under color of office.

Following the removal order to the District Court Petitioner instituted discovery proceedings against the defendants for the production of records and documents. A subpoena *duces tecum* was issued in October, 1963 (See Suppl. App. Court of Appeals 9-12 inclusive).

Defendants resisted said subpoena. Petitioner filed a motion to show cause against Baggott & Morrison for failure to comply with the court orders of October 17, 1963 and December 17, 1964 (App. Court of Appeals 23, 24). The District Court denied the motion to show cause.

Petitioner called to the attention of the Court of Appeals in his Petition for Rehearing:

> "ALTHOUGH PLAINTIFF WAS PERMITTED VERY LIMITED DISCOVERY, SUCH RECORDS AS WERE OBTAINED, BY COURT ORDER FROM THE DEFENDANT, BAGGOTT & MORRISON, AND STATEMENTS MADE BY OTHER DEFENDANTS AFFIRMATIVELY SHOW MISREPRESENTATION, FORGERY, PERJURY, FALSIFIED RECORDS, MANUFACTURED RECORDS, MANIPULATED RECORDS, CONVERSION OF FUNDS, EMBEZZLEMENT. . ."

But the Court of Appeals ignored the above facts.

On June 3, 1966, Petitioner requested leave to file an additional memorandum and amended complaint within 10 days. (App. Court of Appeals 25). He also requested the Court to defer ruling on Defendants' motion (App. Court of Appeals 25-29). These were denied by the Court on the same day.

The Court closed the discovery before Petitioner had the records which are required to be kept by each commission merchant for each customer, namely, the daily segregation records which are mandatory under Sec. 1.32 of the Commodity Exchange Act. (May 18, 1965—see App. Court of Appeals 24).

In the Court's opinion (App. Court of Appeals 125) it is stated that the Petitioner contended that the two Govern-

ment agents at one of the Defendant's direction, had submitted certain statements in answering a certain check list on Baggot & Morrison's operations. This check list stated that there were no unauthorized payments from segregated funds, that cancelled checks were examined, and that daily segregation statements were examined. These cancelled checks and daily segregation statements were denied to Petitioner.

While admitting (App. Court of Appeals 131) that the documents produced by the Defendants "involves but a muniscule portion of the total facts in the case", the Court nevertheless rendered a Summary Judgment and dismissed the two Government agents as Defendants and then remanded the balance of the case to the State Court.

In its Opinion the Court rejected Plaintiff's contention that it retain jurisdiction. The Court said: "There is no basis for asserting a claim against the United States in this proceeding, nor does the record disclose any facts which would give rise to an action against other federal officials."

Following the entry of the Summary Judgment Bernhard Rosee, plaintiff, presented a motion under Rule 60 (b) to set aside the Summary Judgment and to set aside the Remand Order. This motion included supporting data.

Motion under Rule 60 (b) was denied.

## ARGUMENT SUPPORTING REASONS RELIED ON FOR THE ALLOWANCE OF PETITION

### I.

### THE COURT OF APPEALS ERRED IN NOT REVERSING THE DISTRICT COURT JUDGMENT AS PETITIONER HAD BEEN DEPRIVED OF THE RIGHT TO MAKE A SINGLE AMENDMENT TO HIS ORIGINAL COMPLAINT.

The denial by the District Court on June 3, 1966 of Petitioner's Motion that he be allowed to file an additional memorandum and ten days to amend was by implication affirmed by the Court of Appeals.[1] The failure of that Court to refer to this vital and other significant issues will subsequently be argued as additional reasons for granting this Petition. The denial of the right to Amend was in violation of Rule 15 for (1) the complaint had not been previously amended; (2) a formal timely motion was made by Petitioner (App. Court of Appeals 24-29); (3) the Defendants removed the case to the Federal Courts imposing upon Petitioner the additional burdens of time and money arising out of the transfer and dismissal; (4) the complaint on its face contained substantial allegations commonly presented under Title 15.

[1] Petitioner in his Appeal argued the District Court's denial of his Motion to Amend in his Amended Brief (p. 57) and his Reply Brief (p. 13). In his conclusion he requested the Court of Appeals to reverse the judgment below so as to "(a) to permit plaintiff to amend his complaint to add the United States of America as a defendant under the Federal Tort Claims Act, and add a count under the anti-trust law." (page 13).

The denial of the right to amend was particularly arbitrary in the light of the circumstances of the case. There was no dispute but that the facts upon which Plaintiff's claims rested were inter-related and frequently inseparable as to all the parties defendant. Though the District Court in its conclusion implies that the facts affecting Kibby and Gordon involved but a minor portion of the total facts, his opinion as a whole indicates that he was in error.

In the light of Rule 15 and the decisions of this and other Federal Courts, the District Judge was required to give Petitioner a reasonable time to amend his complaint to add the United States of America as a defendant under the Federal Tort Claims Act, and add a count under the antitrust laws.

The District Judge was informed that Petitioner was preparing an antitrust law action against the Board of Trade (see Supp. App. Court of Appeals 99).

Petitioner also, on June 3, 1966, requested only ten additional days to amend his Complaint (App. Court of Appeals 24-29). A long line of decisions reveals the District Court acted arbitrarily in denying leave to amend. *Foman* v. *Davis*, 371 US 178, 182 (1962), *Fuhrer* v. *Fuhrer*, 292 F 2d 140, 142, 143 (CA 7), *Peckham* v. *Scanlon*, 241 F 2d 761, 764, CA 7 (1957), *Bonanno* v. *Thomas, et al.*, 309 F 2d 320, 321, 322 CA 9 (1962).

The *Foman* case would seem to be controlling in that it, like the present suit, involved possible alternative causes of action. In *Foman*, the Court reversed both the District Court and the Court of Appeals for failure to permit the filing of an amendment based upon an alternative theory desire to amend. A similar error was committed here and the Petition should therefore be allowed and the judgments below set aside.

## II.

## THE COURT ERRED IN ENTERING SUMMARY JUDGMENT.

The Court committed fundamental errors in entering summary judgment on behalf of Kibby and Gordon.

The Court's sole function in determining the motion for summary judgment was to decide whether there is any "genuine issue as to any material fact" between plaintiff and Kibby and Gordon. Rule 56 (c), Federal Rules of Civil Procedure. When such an issue is found, the Court's function ends. *Homan Mfg. Co.* v. *Long,* 242 F. 2d 645, 656 (C.A. 7th, 1957); *American Security Company* v. *Hamilton Glass Co.,* 254 F. 2d 889, 893 (C.A. 7th, 1958).

This elementary rule is rigidly applied where (as in this case) the ultimate issue is one of conspiracy, requiring inquiry into defendants' purpose and intent. See *Alabama Great So. R. Co.* v. *Louisville & Nashville R. R. Co.,* 224 F. 2d 408, 411 (C.A. 2d 1956); *Subin* v. *Goldsmith,* 224 F. 2d 753, 758 (C.A. 2d, 1955).

Further, where (as in this case) plaintiff has demanded trial by jury, the Court may not supplant his judgment for that of a jury by resolving *any* factual issue. *Sartor* v. *Arkansas Natural Gas Corp.,* 321 U.S. 620, 627 (1944); *Hartford Acc. & Indem. Co.* v. *Northwest National Bank,* 228 F. 2d 391, 395 (C.A. 7th, 1955); *Preston* v. *Aetna Life Ins. Co.,* 174 F. 2d 10, 14 (C.A. 7th, 1949); *Campana Corporation* v. *Harrison,* 135 F. 2d 334, 335 (C.A. 7th, 1943).

Finally, the Court of Appeals for this Circuit has often held that if *any* doubt exists as to whether or not there is a genuine issue of fact, the doubt should be resolved against the party who has moved for summary judgment, and the opposing party should be accorded full opportunity to prove his case at the trial. *Hazeltine Research, Inc.* v. *General Electric Co.,* 183 F. 2d 3, 7 (C.A. 7th, 1950).

## REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

### I. This Case Creates a Unique Problem which This Court Should Resolve.

Congress, for the protection of the public and the national welfare, enacted the Commodity Exchange Act in 1936 with provisions strictly regulating the manner in which each commission merchant must keep books and records for each customer in order to prevent cheating and defrauding by commission merchants of the public. Petitioner, although then a member of the Board of Trade cleared his trades through commission merchants, Baggot & Morrison, defendants herein.

Baggot & Morrison, like any other commission merchants, were compelled under the Commodity Exchange Act, to keep records under Sections 1.31 to 1.35 inclusive of said Act, especially Section 1.32 which reads as follows:

> **"Sec. 1.32 Segregated account; daily computation and permanent record. The amount of money, securities, and property which must be in segregated account in order to comply with the requirements of section 4d (2) of the Commodity Exchange Act shall be computed by each futures commission merchant as of the close of the market each business day, based upon his accounting records. A permanent record of such computation shall be made and kept in readily accessible form, together with all supporting data."**

Petitioner for the past nine years, including the arbitration proceedings and the later court proceedings, has been deprived of the daily segregation records under Section 1.32, which are the only records which could prove his case.

This case is a classic instance of the manner in which the intent of Congress to protect the public was ignored by a Federal Court which does not understand the daily workings of the Exchange. If this is permitted to stand it would give a green light to commission merchants to manipulate records knowing that the daily segregation records could not be subpoened.

**II. Petitioner Was Denied The Right to Jury Trial by Wrongful Entry of Summary Judgment in Conspiracy and Fraud Case Contrary to Seventh Amendment to United States Constitution.**

Petitioner made a proper demand for trial by jury. The United States Constitution guarantees him a trial by jury in this civil case involving far in excess of the requisite twenty dollar amount. *U. S. Const., Amend. 7*

Where vast amounts of financial transactions are involved, and a proper jury demand is made, a party is constitutionally entitled to a trial by jury in a case involving a *conspiracy, Inland Steel Prods. Co.* v. *MPH Mfg. Co.*, 25 F.R.D. 238 (N.D., Ill., 1959), or an *accounting, King* v. *United Ben. Fire Ins. Co.*, 377 F. (2d) 728 (10 Cir., 1967).

In addition, Petitioner's Brief to the Circuit Court of Appeals raised three additional factual issues upon which he was denied a right to contest:

1. Whether a particular account (No. 35) disclaimed by Petitioner was, in fact, his account.

2. Whether the deficits attributed to Petitioner in such account were his.

3. Whether the account's figures were accurately portrayed.

(See Appellant's Court of Appeals Amended Brief, pp. 16-26).

## CONCLUSION

For the many reasons set forth herein and in order to avoid a harsh injustice, it is submitted that Petitioner's case should be heard by this Honorable Court.

In a special concurring opinion, Mr. Justice Douglas stated in *King* v. *Smith,* 391 U.S. ....., 36 U.S. Law Week 4711 (decided June 18, 1968):

> "The Court follows the statutory route in reaching the result that I reach on constitutional grounds. It is, of course, traditional that our disposition of cases should, if possible, be on statutory rather than constitutional grounds, unless problems of statutory construction are insurmountable. *E.g., Harmon* v. *Brucker,* 355 U.S. 579, 581."

Herein, Petitioner has demonstrated that there exist *both* important constitutional and statutory grounds, vitally affecting the procedural administration of federal Trial Courts as well as our Nation's public agricultural policy.

WHEREFORE, Your Petitioner prays that this Honorable Court grant this Petition and issue a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

BERNARD ROSEE
*Petitioner, Pro se*

# APPENDIX

# APPENDIX

STATE OF ILLINOIS )
) ss.
COUNTY OF COOK )

IN THE CIRCUIT COURT OF COOK COUNTY

JURY DEMAND
CERTIFIED COPY

BERNHARD ROSEE,
*Plaintiff,*

vs.

BOARD OF TRADE OF THE CITY OF CHICAGO, an Illinois corporation; JAMES E. BAGGOTT, JR., and DONALD W. MORRISON, individually and d/b/a BAGGOTT & MORRISON; HARRIS HAYWOOD; SIDNEY C. HAMPER, MARTIN H. MILEK, ROY C. LOFTUS, RICHARD ROSE, RAYMOND COMENZO, and THOMAS HERR, individually and as members of the Committee of Arbitration of the Board of Trade of the City of Chicago; JULIUS MAYER; WILBERT E. HUGE; ROBERT L. DAVID; THOMAS E. HOSTY; ROBERT C. LIEBENOW, individually and as President of the Board of Trade of the City of Chicago; WARREN W. LEBECK, individually and as Secretary of the Board of Trade of the City of Chicago; JAMES J. COUGHLIN; ALBERT W. KIBBY; and SAM GORDON,
*Defendants.*

No. 63 C 11740

In Chancery

63 C 1348

A True Copy:
Teste:
Kenneth J. Carrick
Clerk of the United States Court of Appeals for the Seventh Circuit.
John M. Fanning

## COMPLAINT

Now comes Bernhard Rosee, plaintiff, by his duly authorized attorney, and complains of defendants as follows:

*Description of Parties*

1. Plaintiff has at all relevant times been a citizen and resident of the State of Illinois and a member of the defendant Board of Trade of the City of Chicago.

2. Defendant Board of Trade of the City of Chicago (hereinafter referred to as the "Board of Trade") is a corporation organized under a special act of the Legislature of State of Illinois.

# UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

Wednesday, June 26, 1968

Before

HON. ELMER J. SCHNACKENBERG, *Circuit Judge*

HON. LATHAM CASTLE, *Chief Judge*

HON. JOHN S. HASTINGS, *Circuit Judge*

BERNHARD ROSEE,
*Plaintiff-Appellant,*
Nos. 15886 & 16373 vs.
ALBERT W. KIBBY, *et al.*,
*Defendants-Appellees.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

IT IS ORDERED by the Court that the petition for rehearing filed in the above entitled causes be and the same is hereby denied.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Tuesday, May 28, 1968

Before

HON. ELMER J. SCHNACKENBERG, *Circuit Judge*

HON. LATHAM CASTLE, *Chief Judge*

HON. JOHN S. HASTINGS, *Circuit Judge*

BERNHARD ROSEE,
*Plaintiff-Appellant,*
Nos. 15886 & 16373 vs.
ALBERT W. KIBBY, *et al.*,
*Defendants-Appellees.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

The court having considered the record in this case transmitted by the district court, as well as the briefs filed by the respective parties herein, and having heard oral arguments in open court by plaintiff appearing *pro se*, and by counsel for defendants, and having taken the case under advisement for decision, the court has conferred thereon and is now of the opinion and accordingly holds and adjudges that the judgment order of the district court dated June 13, 1966 granting defendants' motion motion for summary judgment, and the order of the district court dated June 2, 1967, denying plaintiff's motion pursuant to rule 60 (b) of the Federal Rules of Civil Procedure upon which this consolidated appeal is taken, are supported by the record herein and the law appertaining thereto.

WHEREFORE, there being support in the record for the judgment of the district court which considered plaintiff's allegations, including the alleged conspiratorial arrangement of defendants with certain non-government defendants (not now before this court) relative to the business account of plaintiff, and correctly concluded on this record that there is no factual basis for plaintiff's conclusion of wrongdoing on the part of defendants or that defendants were responsible for plaintiff's alleged damages. It Is Hereby Ordered, Adjudged and Decreed that the judgment order and the order from which these appeals are taken, be, and the same are hereby affirmed.

It Is Further Ordered that the supplemental request of plaintiff filed December 13, 1967 that this court reconsider its order heretofore entered on September 14, 1967 dismissing these appeals as to certain defendants, taken for disposition with these appeals by this court's order of January 2, 1968, be, and the same is hereby denied.

# No. 763

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OCTOBER TERM, A.D. 1968

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*Petitioner,*

VS.

**BOARD OF TRADE OF THE CITY OF CHICAGO, an Illinois corporation; JAMES E. BAGGOT, JR., and DONALD W. MORRISON, individually and d/b/a BAGGOT & MORRISON; HARRIS HAYWOOD; SIDNEY C. HAMPER, MARTIN H. MILEK, ROY C. LOFTUS, RICHARD ROSE, RAYMOND COMENZO, and THOMAS HERR, individually and as members of the Committee of Arbitration of the Board of Trade of the City of Chicago; JULIUS MAYER; WILBERT E. HUGE; ROBERT L. DAVID; THOMAS E. HOSTY; ROBERT C. LIEBENOW, individually and as President of the Board of Trade of the City of Chicago; WARREN W. LEBECK, individually and as Secretary of the Board of Trade of the City of Chicago; JAMES J. COUGHLIN; ALBERT W. KIBBY; and SAM GORDON,**

*Respondents.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

## MOTION FOR LEAVE TO FILE AN AMENDMENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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OCTOBER TERM, A.D. 1968

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*Respondents.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

**MOTION FOR LEAVE TO FILE AN AMENDMENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

NOW COMES the petitioner, *pro se,* and respectfully moves this Court to file an amendment to his Petition in this Court, and states that the original Petition inadvertently omitted certain important factors necessary for this Court's consideration. Those matters are as follows:

Refusal by the Court of Appeals to review the Lower Court's decision against the Board of Trade is against the interest of the public.

The Trial Court determined and decided that an Account No. 35 showing a $19,000 loss belonged to plaintiff-appellant, and the Trial Court refers to Account No. 35 108 times in thirty-two pages of its Opinion. See Court of Appeals, App. pp. 55, 57, 58, 59, 61, 62, 64, 65, 66, 70, 74, 77, 78, 82, 83, 85, 86, 89, 90, 95, 97, 105, 106, 117, 120, 121, 122, 123, 125, 126, 127, and 128. (See especially App. p. 61.)

On page 30 of Court of Appeals Supplemental App. of Plaintiff-Appellant (Consolidated Appeals Nos. 15886 and 16373) the actual document reflecting Account No. 35 is shown without any identifying name and address. This is contrary to the wish of Congress and in direct violation of Sec. 1.37 of the Commodity Exchange Act which reads as follows:

> **"Sec. 1.37 Customer's name, address and occupation recorded: record of guarantor of controller of account. Each futures commission merchant and each member of a contract market shall keep a record in permanent form which shall show for each commodity futures account carried by him the true name and address of the person for whom such account is carried and the principal occupation or business of such person as well as the name of any other person guaranteeing such account or exercising any trading control with respect to such account. Such record shall be open to inspection by any authorized representative of the Commodity Exchange Authority."**

Petitioner explained this violation (page 24 of his Amended Brief in the Court of Appeals). However, the Court of Appeals refused to take any notice of this explanation and ignored this fraud and conspiracy against the plaintiff-appellant.

The Trial Court also chose to ignore (Appendix pp. 120 and 121) plaintiff-appellant's contention that the combining of two accounts (Nos. 35 and 45) was in violation of the Commodity Exchange Act Regulations prohibiting changing of account numbers. The Court stated that Rosee's contentions regarding CEA Regulations are incorrect, that the prohibition applies only to the "confidential" reporting numbers issued by the CEA Administrator, not to account numbers used for internal purposes in a brokerage firm.

For the Court's information, Sec. 17.01 of the Commodity Exchange Act as Amended states as follows:

> **Sec. 17.01. Special Account designation and identification. For the purpose of reporting, each futures commission merchant and each foreign broker shall assign a number to each Special Account and shall report such account only by such number. When a Special Account is reported for the first time, the futures commission merchant or foreign broker shall execute CEA Form 102, showing the information requested thereon, including the names and addresses of all persons known to have a financial interest in or control over the account to which the number has been assigned, and shall transmit the same with the report but in a separate sealed envelope marked "confidential." No account number shall be changed or assigned to another account without the prior approval of the Act Administrator. (Emphasis added)**

The Supreme Court of the United States should therefore decide in the public interest: (1) Does the CEA permit an account without any name or address; and (2) can two accounts be combined, contrary to Sec. 17.01 of the Commodity Exchange Act Regulations.

These are the very things that Congress attempted to prevent in protecting the interest of the public when they laid down their regulations as to the manner in which books and records were to be kept. Petitioner is a victim of these violations and the conspiracy to cheat and defraud him through the use of these violations. He was foreclosed from obtaining records, through proper discovery procedures, to prove the conspiracy against him. (See Supp. App. Ct. of Appeal 85-92, 97-98).

Respectfully submitted,

.....

BERNHARD ROSEE, *Pro se.*

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328-979—68

# In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 763

BERNHARD ROSEE, PETITIONER

*v.*

BOARD OF TRADE OF THE CITY OF CHICAGO, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR RESPONDENTS KIBBY AND GORDON IN OPPOSITION

### OPINIONS BELOW

Neither the opinion of the district court (App. 30–131 [1]) nor the order of the court of appeals (Pet. App. 4–5) is reported.

### JURISDICTION

The judgment of the court of appeals was entered on May 28, 1968 (Pet. App. 4–5), and a timely petition for rehearing was denied on June 26, 1968 (Pet. App. 3). On September 16, 1968, Mr. Justice Marshall extended the time within which to file a petition for certiorari to and including November 23, 1968, and the

[1] "App." refers to the appendix to petitioner's brief in the court of appeals. "Supp. App." refers to the supplementary appendix to petitioner's brief in the court of appeals. "Pet. App." refers to the appendix to the petition for certiorari.

App. 42). Upon petitioner's failure to satisfy the award, the board of directors suspended him from membership on the Board of Trade and, after the award had remained unsatisfied for more than two years, sold his membership for $8,800 (App. 42).

Petitioner filed this suit in an Illinois court on July 12, 1963, naming as defendants the Board of Trade, various of its officers, the members of the Arbitration Committee, Baggot, Morrison and two Chicago officials of the Commodity Exchange Administration, Kibby and Gordon (App. 1). The complaint alleged that several of the Board of Trade defendants since 1956 had conspired to deprive Rosee of his membership on the Board of Trade and to destroy his business (App. 5); that Baggot and Morrison joined the conspiracy in 1959 (App. 6), and the members of the Arbitration Committee and Kibby and Gordon in 1960 (App. 7–8). It sought actual damages of $353,000, punitive damages of $1 million and restoration of his membership on the Board (App. 10, 13). The sole allegation relating to Kibby and Gordon was that they "contrived to conceal the conversions of funds from plaintiff by Baggot & Morrison and the charging to plaintiff's account of trades made by other persons, even though said defendants had full knowledge of such occurrences and were repeatedly requested by plaintiff to take action with respect thereto" (App. 8–9).[2] The gravamen of petitioner's charges

[2] This was the third such suit that Rosee had filed. He nonsuited his first action, filed in the State court; his second suit, filed in the federal court and identical to the first except that

against them, as developed during the proceedings in the district court, was that they had submitted false reports to their superiors and had failed adequately to investigate certain charges petitioner had made against Baggot and Morrison (*e.g.* App. 104–105, 109–110, 113, 128–130).

Kibby and Gordon removed the case to the federal court, on the ground that their "acts * * * in furtherance of the alleged conspiracy took place under color of their official positions as agents of the CEA" (App. 30). Two years later, in June 1965—after what the district court characterized as "the fullest possible opportunity to engage in discovery" relating to the claim against Kibby and Gordon (App. 32) and "an extensive period of discovery" (App. 39)—Kibby and Gordon moved to dismiss as to them, on the ground that everything they had done was part of their duties as federal officers and thus privileged, or, alternatively, for summary judgment (App. 17). They submitted three affidavits. One (App. 18–19), by the Director of the Compliance Division of the Commodity Exchange Administration in Washington, D.C., stated that the investigations by Kibby and Gordon relating to this case were under his direction and control. Gordon submitted an affidavit that he was a Supervisory Investigator and Chief of the Compliance Section of the agency in Chicago; that one of his duties included investigating trade practices and activities of traders

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the United States was also named a defendant, was dismissed for lack of jurisdiction upon the finding that petitioner had made the United States a defendant merely to obtain discovery from it (App. 31).

and commission merchants; and that under CEA regulations he was without authority to initiate investigations of violations of the Commodity Exchange Act and Regulations (App. 19–21). Kibby filed an affidavit that he was Commodity Exchange Supervisor of the Chicago Office of the CEA; that his duties included supervision of and participation in the investigations of persons and firms subject to the Commodity Exchange Act in Chicago; and that he had no authority to initiate investigations (App. 21–22).

In June 1966 the district court denied the motion to dismiss but granted summary judgment in favor of Kibby and Gordon, and remanded the action against the remaining defendants to the State court (App. 29–30). In an exhaustive opinion which discussed in great detail the facts relating to each of petitioner's allegations (App. 30–131), the court concluded that "plaintiff has been unable to produce even a scintilla of evidence which would suggest there is any factual basis for the allegations made in his complaint against Kibby and Gordon" (App. 129).[3]

After briefing and oral argument, the court of appeals affirmed *per curiam*. The court held (Pet. App. 5) that there was "support in the record for

[3] Approximately ten months later, while the case was on appeal, petitioner filed a motion under Rule 60(b), F.R. Civ. P., to set aside the grant of summary judgment for fraud, on the ground that a document that had been submitted to the court *in camera* was false (App. 131–138). The district court denied the motion (App. 224), stating at the argument thereon that it had not assumed the accuracy of a particular document that petitioner claimed had misled the court (Supp. App. 100). Petitioner then appealed from the denial of his motion, and the court of appeals consolidated the appeals.

the judgment of the district court which considered plaintiff's aliegations, including the alleged conspiratorial arrangement of defendants with certain non-government defendants (not now before this court) relative to the business account of plaintiff, and correctly concluded on this record that there is no factual basis for plaintiff's conclusion of wrongdoing on the part of defendants or that defendants were responsible for plaintiff's alleged damages."

## ARGUMENT

1. The district court was fully warranted in granting summary judgment in favor of the federal officials. As the district court's extensive opinion demonstrates, after two and one-half years of discovery petitioner had been unable to produce any evidence that Kibby and Gordon had been parties to any illegal conspiracy. There had been extensive discovery; in 1965 the district court rejected the claim of the Commodity Exchange Administration that various documents in its possession sought by petitioner were privileged, and directed the agency to produce them. 36 F.R.D. 684, 691. The court of appeals upheld the grant of summary judgment, holding "on this record that there is no factual basis for plaintiff's conclusion of wrongdoing on the part of defendants or that defendants were responsible for plaintiff's alleged damages" (Pet. App. 5). The correctness of the grant of summary judgment raises only factual questions as to which there is no occasion for further review. Since both courts below determined that petitioner had raised no triable issues of

fact, petitioner was not entitled to a jury trial. Cf. *Galloway* v. *United States,* 319 U.S. 372.

2. The decision below may also be upheld on the alternative ground that the federal officials were immune from suit because all their acts upon which petitioner predicates their liability were done in the course of their official duties. *Barr* v. *Matteo,* 360 U.S. 564; *Howard* v. *Lyons,* 360 U.S. 593; *Yaselli* v. *Goff,* 12 F. 2d 396 (C.A. 2), affirmed *per curiam,* 275 U.S. 503; *Alzua* v. *Johnson,* 231 U.S. 106; *Spalding* v. *Vilas,* 161 U.S. 483; *Bradley* v. *Fisher,* 13 Wall. 335; *Kendall* v. *Stokes,* 3 How. 87. The official immunity rule has been applied in actions predicated upon the very type of tortious conduct which allegedly forms the basis for the present suit: conspiracy [4] and injury to business or professional reputation.[5]

The gravamen of petitioner's contentions with respect to Kibby and Gordon was that they performed their official duties improperly, as part of a conspiracy. The record shows that the various inspections and reports upon which petitioner relies were all made as part of their regular governmental functions (App. 18–22). The immunity is not destroyed because of the allegation that in performing their

[4] *Gregoire* v. *Biddle,* 177 F. 2d 579 (C.A. 2), certiorari denied, 339 U.S. 949; *Brictson* v. *Woodrough, et al.,* 164 F. 2d 107 (C.A. 8), certiorari denied, 334 U.S. 849; *Yaselli* v. *Goff,* 12 F. 2d 396 (C.A. 2), affirmed *per curiam,* 275 U.S. 503.

[5] *Le Burkien* v. *Notti,* 365 F. 2d 143 (C.A. 7); *Brictson* v. *Woodrough, et al.,* 164 F. 2d 107 (C.A. 8), certiorari denied, 334 U.S. 849; *Bowman* v. *White,* 388 F. 2d 756 (C.A. 4), certiorari denied October 14, 1968, *sub nom. Bowman* v. *First National Bank of Harrisonburg,* 37 L.W. 3137.

duties the government officials acted pursuant to a conspiracy with outsiders. *Yaselli* v. *Goff*, 12 F. 2d 396 (C.A. 2), affirmed *per curiam*, 275 U.S. 503.

3. Petitioner was not denied adequate discovery as to the CEA. The district court on February 16, 1965, after *in camera* inspection of documents,[6] ordered the official in charge of the Chicago office of the CEA to produce the materials sought by petitioner, with the only relevant condition being that with respect to "daily and periodic reports filed with the Authority," petitioner was to specify particular dates (36 F.R.D. at 691). There is nothing to show that this order was not complied with.

4. Finally, the district court did not abuse its discretion in denying petitioner leave to amend his complaint to add counts under the antitrust laws and the Federal Tort Claims Act (28 U.S.C. 1346(b)). The action had been pending in the district court for nearly three years, and it was petitioner's third suit arising out of the same matter. Moreover, any claim against Kibby and Gordon under the antitrust laws would be precluded by the immunity doctrine discussed above, and any claim under the Federal Tort Claims Act would not only require adding the United States as a defendant, but would also be barred by the two-year statute of limitations in that Act. Under *Foman* v. *Davis*, 371 U.S. 178, 182, relied upon by petitioner, the district court in its discretion justi-

[6] Petitioner misconceives the significance of the *in camera* inspection of the documents by the district court. That inspection was made to afford the court the opportunity to consider the request for discovery—not to decide the case upon the basis of such inspection. See 36 F.R.D. at 687.

fiably concluded that in these circumstances such an amendment of the complaint, with its inevitable further delay, was unwarranted.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
*Solicitor General.*
EDWIN L. WEISL, JR.,
*Assistant Attorney General.*
JOHN C. ELDRIDGE,
WILLIAM KANTER,
*Attorneys.*

DECEMBER 1968.

U.S. GOVERNMENT PRINTING OFFICE: 1968

SUPREME COURT, U. S.

No. 763

FILED
DEC 27 1968
JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, A.D. 1968

**BERNHARD ROSEE,**

*Petitioner,*

vs.

**BOARD OF TRADE OF THE CITY OF CHICAGO, an Illinois corporation; JAMES E. BAGGOT, JR., and DONALD W. MORRISON, individually and d/b/a BAGGOT & MORRISON; HARRIS HAYWOOD; SIDNEY C. HAMPER, MARTIN H. MILEK, ROY C. LOFTUS, RICHARD ROSE, RAYMOND COMENZO, and THOMAS HERR, individually and as members of the Committee of Arbitration of the Board of Trade of the City of Chicago; JULIUS MAYER; WILBERT E. HUGE; ROBERT L. DAVID; THOMAS E. HOSTY; ROBERT C. LIEBENOW, individually and as President of the Board of Trade of the City of Chicago; WARREN W. LEBECK, individually and as Secretary of the Board of Trade of the City of Chicago; JAMES J. COUGHLIN; ALBERT W. KIBBY; and SAM GORDON,**

*Respondents.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

## REPLY FOR PETITIONER

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IN THE

# Supreme Court of the United States

OCTOBER TERM, A.D. 1968

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*Respondents.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

## REPLY FOR PETITIONER

Because respondents persist, just as they did in the Court of Appeals, in making misleading statements, peti-

tioner is compelled to transmit to this court an additional appendix consisting of two letters addressed to the Solicitor General of the United States dated December 5, 1968, and December 7, 1968, respectively. These letters spell out abuses by attorneys for the government in the United States Court of Appeals, 7th Circuit (Appendix, pages 1, 7).

On page 2 of their brief respondents state that petitioner "did not directly buy and sell himself on the Board of Trade." This statement is patently false and the records would show that petitioner himself bought and sold on his own account on the floor of the Board of Trade. He is now deprived of these rights.

Respondents' reference to prior suits filed by petitioner, in the footnote on page 2 of their brief, is misleading because the case at bar is based on a conspiracy and involves defendants not named in the former action.

**Respondents, at page 6, footnote 3, fail to state that petitioner's motion under Rule 60(b), F. R. Civ. P., was filed to set aside not only the summary judgment, but also the order of remand because the decision was based on fraud. See Ct. of Appeals App. 131-155.**

No serious consideration should be given respondents' reference to arbitration proceedings because petitioner as a member of the Board of Trade was denied rights enjoyed by any other member. See petitioner's complaint, Ct. of Appeals App. 1-16.

The Court of Appeals gravely erred in refusing to review an order of the District Court which decided that a whole

mass of documentary evidence withheld from petitioner was privileged. Such order appears in the record as follows:

2-16-65 Docket, United States District Court for the Northern District of Illinois, No. 63C 1348

**2/16/65 Filed Opinion.**

**Pursuant to opinion this day filed Court orders the production pursuant to the subpoena duces tecum served by the plaintiff, Bernhard Rosee, on Roger E. Harper and filed with the Clerk of this Court on May 21, 1964, certain documents as specified in draft order. Court refuses to order production of the documents, as specified in draft, on the ground that they are privileged or irrelevant and vacates its order of August 24, 1964 denying the motion of Roger E. Harper to quash the aforementioned subpoena with respect to said documents.—Draft—Will, J.**

Petitioner had duly sought such records by a proper subpoena (Supp. App. Ct. of Appeals 9-12). An additional point for decision, therefore, is whether such relevant records are immune from discovery.

This case is replete with technical decisions touching upon jurisdiction, even discovery, which never permitted a full trial on the merits and which never even gave to petitioner full access to available evidence. Petitioner is entitled to his day in court which has to date been denied him.

The contention, on page 7 of respondents' brief, that certain non-government defendants are not now before this court is incorrect because the conspiracy which is the gravamen of the complaint is inseparable and interwoven as to *all* parties defendant.

Respondents (page 9 of their brief) state: "The immunity is not destroyed because of the allegations that in performing their duties the government officials acted pursuant to a conspiracy with outsiders." Defendant Board of Trade and others cannot be considered as "outsiders" because they are under the jurisdiction and supervision of the Commodity Exchange Authority and must submit daily reports of all transactions from coast to coast in the United States as well as those from foreign countries, if any, as required by the C. E. A.

Furthermore, the acts of conspiracy by Kibby and Gordon were done under *Color of office.* See Removal Order, App. of this Reply p. 9. None of the cases cited by respondent deals with a conspiracy under color of office involving violations of the C. E. A.

It is imperative that this case be reviewed by this court because dealings in the Board of Trade vitally affects the public interest.

WHEREFORE, Your Petitioner prays that this Honorable Court grant this Petition and issue a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

BERNHARD ROSEE
*Petitioner, Pro se*

# APPENDIX

## APPENDIX A

December 5, 1968

Solicitor General of the United States
Department Of Justice
9th & Pennsylvania Avenue
Washington, D. C.
Attention: Daniel M. Friedman (5th Floor)

Re: Bernhard Rosee
Vs: Board of Trade of the City of Chicago, et al, U. S. Court of Appeals for the Seventh Circuit, Case Nos. 15886 and 16373; and Petition for Certiorari in the U. S. Supreme Court, No. 763

Dear Sir:

In accordance with your request made during our telephone conversation of December 3, 1968, I herewith call to your attention the misstatements made by Mr. William Kanter, an attorney, associated with the Justice Department and others in their Reply Brief filed in the U. S. Court of Appeals, for the Seventh Circuit filed on May 2, 1968.

On page 4 of the Reply Brief in which he states: "after extensive discovery proceedings taking place for two and one half years . . . ." this statement is very misleading and is an attempt to deceive the Court, and made the Court believe that I had (plaintiff appellant or petitioner) had a completed discovery, which is untrue.

Plaintiff appellant served a Subpoena duces tecum on October 1963, for a production of the documents in the possession of the government and other defendants. The U. S. Attorney, Mr. McGlendon, representing defendant Kibby and Gordon, refused to comply with the subpoena.

One year later, October 1, 1964, he offered the documents for an in camera inspection to the trial court over the objection of my attorney, William Harte, and plaintiff appellant has no knowledge what documents were submitted to court *in camera*. (See Supp. App. Ct. Appeals, pages 16 to 18) The most vital records which would prove plaintiff appellant's case have been withheld for the past 8 years, which records could have immediately proven plaintiff's case.

Mr. Kibby testified (appendix 248) that the agency of the Commodity Exchange Authority received confirmation from the Board of Trade Clearing Corporation and these documents submitted to Kirby by the Clearing House of the Board of Trade would prove that plaintiff was a victim of fraud and conspiracy, and also prove the existence of an account No. 45; also account No. 35 and would disclose the real ownership of these two accounts. Under the Commodity Exchange Act, Sec. 1.5, the Secretary of Agriculture, U. S. Attorney Mr. McGlendon, and the trial court abused their discretion and withheld the records from plaintiff appellant to prove his case. Because Sec. 1.5 reads as follows:

> **"Information confidential; disclosures to contract-market committees and officials. No officer or employee of the Department of Agriculture shall publish, divulge, or make known in any manner, except insofar as may be required in the performance of his official duties or by a court of competent jurisdiction, any facts or information regarding the business of any person which may come to the knowledge of such officer or employee through any inspection or examination of the reports or records of, or through any information given by, any person pursuant to the Commodity Exchange Act or these rules and regulations: Provided, however, That this prohibition shall not apply to disclosures made in good faith to the Business**

**Conduct Committee or other proper committee or official of a contract market of matters in respect to which such contract market has responsibility or duty under the Commodity Exchange Act, or which, in the judgment of the Act Administrator, adversely affect such market or are prejudicial to the interest of producers or consumers."**

The above statute, Sec. 1.5, proves that plaintiff appellant was deprived the right to obtain the records enabling him to prove his case.

Although the trial court made two decisions—35 F.R.D. 512, 36 F.R.D. 584, in which the court stated that the records should be made available; nevertheless, Mr. McGlendon refused to supply these records and instead gave it to the court in camera. Plaintiff appellant was prevented from obtaining the true records which is required to be kept by each commission merchant under the Commodity Exchange Act, Sec. 131-137 inclusive.

Although plaintiff appellant received very few documents from Mr. McGlendon during the month of April, 1965, some were the most shocking and falsified documents, Exhibit A, Ct Appeals App. 141-145 inclusive; also, Supp. App. Ct Appeals 43-44, and plaintiff appellant was prevented from cross-examining the parties who prepared these documents. Furthermore, the falsehood of these documents could be proven by the confirmation submitted by the Board of Trade Clearing Corporation to the Commodity Exchange Authority as Mr. Kirby testified, App. Ct Appeals 248-250.

On pages 6, 7, 12, 14, 15, 17 and 18 of said brief, Mr. Kanter stated repeatedly that all the acts of Kibby and Gordon, defendant government employees, were done within the "outer perimeter"; Mr. Kanter also infers that plaintiff alleges a "private conspiracy". The statements and inferences serve only to confuse the issues.

Mr. Kanter should not have made these statements nor should he have cited cases which had no bearing to my case, because:

1. The Assistant U. S. Attorney, Barry J. Freeman, in his Notice of Removal, dated July 29, 1963, stated that "All of the alleged acts or omissions took place in the course of the official duties of the petitioner's and under color of their office as officers of the Commodity Exchange Authority". A copy of the Notice and Petition is attached.

2. The affidavits of William S. Jacob, former attorney, and the affidavit of Melvin A. Brandt, former attorney, set forth in the Sup. App. of plaintiff, filed in the U. S. Court of Appeals, Seventh Circuit (pp. 52-55 and pp. 56-57 respectively) conclusively proves that the actions of Kibby and Gordon and others were under color of office and that the action of Kibby was an act of malice.

Another instance of misstatement is set forth in the reply of the attorney in the Justice Department to plaintiff appellant's motion under Rule 60(b) of the Federal Rules of Civil Procedure (U. S. Ct. of App. Appendix, page 186). Here the Department states that plaintiff's assertion that the court did not determine that plaintiff was in a deficit position of $52,950.75, or any other amount.

This statement is clearly false because the trial court determined that plaintiff was in a deficit position (Appendix—pages 35, 37, 38, 41, 42, 50, 52, 53, 56, 61, 64, 65, 66, 67, 70, 74, 75, 76, 78, 79 and 128). The Department of Justice also states on page 186 of the Appendix: "In the second place, any information about a deficit in plaintiff's account in the amount of $52,950.75 could not have come from the questioned document. Such a figure does not appear on the document nor can it be derived from the document by any mathematical calculations." This foregoing

statement is another example of the numerous false statements made by the Department because the document referred to, which appears on page 142 of the Court of Appeals Appendix, clearly shows the deficit of $52,950.75 in plaintiff's account.

On page 19 of the Reply Brief dated May 2, 1968 to the Court of Appeals on behalf of Kibby & Gordon, Mr. Kanter states that the reports contained in Exhibit "A" were prepared by G. Edward Piala. This statement is a device to free Kibby & Gordon of the guilt in the conspiracy. The deposition of Clarence De Witt, agent of the C.E.A., shows conclusively that the investigation of Baggott & Morrisson was conducted and directed by Mr. Kibby (Ct Appeals App. 233-235). As a result of this investigation Baggott & Morrison were found guilty (Docket 93 Ct. of Appeals App. 235-239).

Furthermore, defendant, Samuel F. Gordon, testified in his deposition on April 7th and 8th, 1965, that he worked with Mr. Kibby in the investigation of Baggott & Morrison in the latter part of 1960 and the early part of 1961. (Ct. Appeals Supp. Append. 93-94)

It is clear from the above affirmative facts that Kibby & Gordon, with the assistance of Clarence De Witt, conducted the investigation and the affidavit of Piala is false and fraudulent. Furthermore, I was deprived the right to take Mr. Piala's deposition. The trial court closed the discovery on May 18, 1965, before I had a chance to examine both Mr. Piala and the agent who prepared Exhibit 43-44, Supp. Ct. Appeals.

Appendix 187, Ct. Appeals, in Memorandum Contra to Motion under 60(b), the attorney in the Justice Department states that, "It ignores the deficit in Account No. 35" as though Account No. 35 belonged to plaintiff.

Mr. Kanter ignores the true fact that:

> "On page 30 of Court of Appeals Supplemental App. of Plaintiff-Appellant (Consolidated Appeals Nos. 15886 and 16373) the actual document reflecting Account No. 35 is shown without any identifying name and address. This is contrary to the wish of Congress and in direct violation of Sec. 1.37 of the Commodity Exchange Act."

Mr. Kanter ignored the fact that Account No. 45 was combined with Account No. 35, which is a gross violation of Sec. 17.01 of the C.E.A. He also should have noticed the testimony of Mr. Morrison in the Arbitration Proceedings (Supp. App. Court of Appeals, p. 32), as follows:

TESTIMONY OF ARBITRATION PROCEEDINGS

> "Mr. Morrison: I can explain that we give numbers to new accounts. I was given 45, and Jim was given 35 when he filled his order, and I believe when we got in the office we changed the name, and it started as 45 and 35, and—
>
> Mr. Morrison: The trade was made on the floor, and I believe I gave it the number on the card on the floor. Actually, I had nothing to say or do in determining whether it was to be—I think my card was marked 45 to start with, but the 45 and the 35 wound up later as the 35 Account.
>
> Mr. Herr: That was explained.
>
> Mr. Morrison: The first time, I must have been told to use the number 45, because I couldn't have pulled it out of a hat."

Mr. Friedman, this is only a small fraction of the perpetrated fraud and conspiracy against me, and if the true records were produced, it would conclusively show misrepresentation, forgery, perjury, falsified records, manufactured records, manipulated records, conversion of funds and embezzlement.

I appeal to you for the sake of justice that you take the necessary steps to enable me to obtain the original records and correct the wrong doings, so that I can prove my innocence. If this is not corrected, the entire Commodity Exchange Act is destroyed.

Respectfully submitted,

Bernhard Rosee
1260 North Dearborn Street
Park Dearborn Hotel
Chicago, Illinois 60610

December 7, 1968

Honorable Daniel M. Friedman
% Solicitor General of the United States
Department of Justice
9th & Pennsylvania Avenue
Washington, D. C.

Dear Sir:

In further reference to my letter of December 5th, I herewith submit the statement of Mr. William Kanter, Attorney, Department of Justice, submitted to the U. S. Court of Appeals in Chicago, appearing on pages 21 and 22, in which he wilfully misinterprets the position journal which was obtained by the Court Order from Baggot & Morrison. This position journal is an affirmative act of fraud and contains approximately 320 manipulated entries, this violation being an affirmative violation of Sec. 4b (A) (B) (C).

This violation carries a $10,000.00 fine or one year in jail or both. I am attaching a copy of the above mentioned Sec. 4b (A) (B) (C).

On page 24 of the same reply brief, Mr. Kanter attempts to cover up the embezzlement of $20,000.00 by Baggot &

Morrison by stating that this $20,000.00 had been repaid. This statement is a wilfull act of fraud on the U. S. Court of Appeals in order to protect Kibby & Gordon, Baggot & Morrison and the members of the Arbitration Committee in this conspiracy, because the $20,000.00 which Mr. Kanter refers to was paid directly to the Customer's Segregated Account, which apparently Baggot & Morrison embezzled from other customers and were forced to repay. My $20,000.00 was never repaid to me. See check issued by Baggot & Morrison on November 17, 1959, Ct. Appeals, Supp. App. page 83.

Mr. Kanter surely must have seen Ct. Appeals App. 259, which conclusively shows there was in existence two accounts—No. 35 and No. 45. Nevertheless Mr. Kanter chose to aid these conspirators and to destroy me. These facts have not been stated in my Petition to the Supreme Court because I felt that you, Mr. Friedman, could do it more efficiently to correct these wrong doings.

I am also enclosing a photostat copy of Universal Oil Company c. Root Rfg. Co., pages 580-581, especially note Hazel-Atlas Co. v. Hartford-Empire Co., 322 U.S. 238. There are many other manipulated records and I have been prevented to prove these frauds against me because of the Commodity Exchange Authority refused to supply me with the records as did the Chicago Board of Trade Clearing Corporation.

Again, I appeal to you to find a way to restore my rights to enable me to have my day in Court.

Respectfully yours,

Bernhard Rosee
1260 N. Dearborn Street
Chicago, Illinois 60610

## APPENDIX B

### PETITION FOR REMOVAL

The petitioners, Albert K. Kibby and Sam Gordon, by James P. O'Brien, United States Attorney for the Northern District of Illinois, acting under the direction of the Attorney General of the United States, respectfully represent to the Court as follows:

1. The petitioners at all times relevant to the complaint were Federal Officers, holding positions with the Commodity Exchange Authority of the United States Department of Agriculture.

2. This is an action for damages against the petitioners and others in which it is alleged that the petitioners conspired with other defendants to destroy plaintiff's business, occupation, and livelihod as a member of the Chicago Board of Trade and that pursuant to said conspiracy, the petitioners contrived to conceal from plaintiff certain conversions of funds and falsifications of records committed by other defendants; "even though (the petitioners) had full knowledge of such occurrences and were repeatedly requested by plaintiff to take action with respect thereto."

3. All of the alleged acts or omissions took place in the course of the official duties of the petitioners and under color of their office as officers of the Commodity Exchange Authority, an agency of the United States Government.

4. This petition is filed under the direction of the Department of Justice of the United States and no bond is filed herewith. (28 U.S.C. §2408.) (*Nelson* v. *Peter Kiewil Sons Co.*, 130 F. Supp. 59).

5. Copies of the summons and complaint filed by the plaintiff in this case in the Circuit Court of Cook County, Illinois, are attached hereto.

WHEREFORE, petitioners respectfully ask that the said action be removed to this Court pursuant to the provisions of Section 1442(a)(1), Title 28, United States Code.

.....

James P. O'Brien
United States Attorney

State of Illinois )
) ss
County of Cook )

Barry J. Freeman, Assistant United States Attorney for the Northern District of Illinois, says that he is the attorney for Albert W. Kibby and Sam Gordon, as officers of the Commodity Exchange Authority of the United States Department of Agriculture; and that the facts alleged and statements set forth in the foregoing Petition for Removal are true as he verily believes.

.....

Barry J. Freeman
Assistant United States Attorney

Subscribed and sworn to before me
this 29th day of July, 1963.

.....

Notary Public
BJF:pm

## APPENDIX C

In *Ohio Bell Tel. Co.* v. *Comm'n*, 301 U.S. 292 Mr. Justice Cordozo stated: (p. 300)

> "The Commission had given notice that the value of the property would be fixed as of a date certain. Evidence directed to the value at that time had been laid before the triers of the facts in thousands of printed pages. To make the picture more complete, evidence had been given as to the value at cost of additions and retirements. *Without warning or even the hint of warning that the case would be considered or determined upon any other basis than the evidence submitted, the Commission cut down the values for the years after the date certain upon the strength of information secretly collected and never yet disclosed. The company protested. It asked disclosure of the documents indicative of price trends, and an opportunity to examine them, to analyze them, to explain and to rebut them. The response was a curt refusal. Upon the strength of these unknown documents refunds have been ordered for sums mounting into millions, the Commission reporting its conclusion, but not the underlying proofs. The putative debtor does not know the proofs today. This is not the fair hearing essential to due process. It is condemnation without trial.*"

Then again the Court stated: (p. 304, 305)

> "Regulatory commissions have been invested with board powers within the sphere of duty assigned to them by law. Even in quasi-judicial proceedings their informed and expert judgment exacts and receives a proper deference from courts when it has been reached with due submission to constitutional restraints. *West Ohio Gas Co.* v. *Public Utilities Comm'n* (No. 1), *supra*, p. 70; *West Ohio Gas Co.* v. *Public Utilities Comm'n.* (No. 2), 294 U.S. 79; *Los Angeles Gas & Electric Corp.* v. *Railroad Commission*, 289 U.S. 287, 304. Indeed, much that they do within the realm of administrative discretion is exempt from supervision if those restraints have been obeyed. *All the more in-*

*sistent is the need, when power has been bestowed so freely, that the 'inexorable safeguard' (St. Joseph Stock Yards Co.* v. *United States,* 298 U.S. 38, 73) *of a fair and open hearing be maintained in its integrity. Morgan* v. *United States,* 298 U.S. 468, 480, 481; *Interstate Commerce Comm'n.* v. *Louisville & N.R. Co., supra. The right to such a hearing is one of 'the rudiments of fair play' (Chicago M. & St. P. Ry. Co.* v. *Polt,* 232 U.S. 165, 168) *assured to every litigant by the Fourteenth Amendment as a minimal requirement. West Ohio Gas Co.* v. *Public Utilities Comm'n* (No. 1), (No. 2) *supra; Brinkerhoff-Faris Co.* v. *Hill,* 281 U.S. 673, 682. Cf. *Norwegian Nitrogen Co.* v. *United States, supra. There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored.''*

In *Garner* v. *Louisiana,* 368 U.S. 157, following *Ohio Bell Telephone,* Mr. Justice Frankfurter in his concurring opinion states (p. 175):

> ". . . . A judge's private knowledge, or even 'knowledge by notoriety,' to use Dean Wigmore's phrase, IX Evidence Sec. 2569 (Third ed. 1940), not presented as part of the prosecution's case capable of being met by a defendant, is not an adequate basis, as a matter of due process, to establish an essential element of what is punished as crime. *Thompson* v. *City of Louisville,* 362 U. S. 199."

In *Thorpe* v. *Housing Authority,* 386 U. S. 670, Mr. Justice Douglas states (p. 678):

> "Over and over again we have stressed that 'the nature and the theory of our institutions of government, the principles upon which they are supposed to rest . . . do not mean to leave room for the play and action of purely personal and arbitrary power' (*Yick Wo* v. *Hopkins,* 118 U. S. 356, 369-370) and that the essence of due process is 'the protection of the individual against arbitrary action.' *Ohio Bell Telephone Co.* v. *Public Utilities Comm'n.,* 301 U.S. 292, 302; *Slochower* v. *Board of Education,* 350 U.S. 551, 559."

SUPREME COURT, U. S.

FILED

JAN 2 1969

JOHN F. DAVIS, CLERK

No. 763

IN THE

# Supreme Court of the United States

OCTOBER TERM, A.D. 1968

**BERNHARD ROSEE,**

*Petitioner,*

VS.

**BOARD OF TRADE OF THE CITY OF CHICAGO, an Illinois corporation; JAMES E. BAGGOT, JR., and DONALD W. MORRISON, individually and d/b/a BAGGOT & MORRISON; HARRIS HAYWOOD; SIDNEY C. HAMPER, MARTIN H. MILEK, ROY C. LOFTUS, RICHARD ROSE, RAYMOND COMENZO, and THOMAS HERR, individually and as members of the Committee of Arbitration of the Board of Trade of the City of Chicago; JULIUS MAYER; WILBERT E. HUGE; ROBERT L. DAVID; THOMAS E. HOSTY; ROBERT C. LIEBENOW, individually and as President of the Board of Trade of the City of Chicago; WARREN W. LEBECK, individually and as Secretary of the Board of Trade of the City of Chicago; JAMES J. COUGHLIN; ALBERT W. KIBBY; and SAM GORDON,**

*Respondents.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

## SUPPLEMENT TO REPLY FOR PETITIONER

BERNHARD ROSEE, Pro Se.
1260 N. Dearborn Street
Chicago, Illinois 60610
*Petitioner, pro se*

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

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*Respondents.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

## SUUPLEMENT TO REPLY FOR PETITIONER

NOW COMES the petitioner, *pro se,* and respectfully moves the court for leave to file a supplement to his reply

brief for the reason that petitioner inadvertently omitted replying to certain statements made in the brief for respondents:

Petitioner, further replying to respondent's brief states:

1. Respondents state in paragraph 3 of their argument (Resp. brief p. 9) that petitioner was not denied adequate discovery as to the CEA. This statement is untrue, misleading and contrary to the record. The vital documents in the possession of the CEA including the confirmations of transactions which are submitted by the Clearing House of the Board of Trade to the CEA (as Mr. Kibby testified App. Ct. Appeals, PP. 248-50), as well as records submitted by defendants Baggot and Morrison to the CEA, have never been produced for petitioner's inspection, nor are said confirmations and records in the record before the court. In addition, neither were the cancelled checks nor the daily segregation statements, which were examined as the court states (App. Ct. of Appeals 125), ever produced for petitioner's inspection.

Petitioner specifically described all documents required to prove his case in his subpoena *duces tecum*. Supp. App. Ct. of Appeals, PP. 9-12.

2. In paragraph 4 of their argument (Resp. brief P. 9), respondents imply that petitioner could have amended his complaint during the three year period in which the action was pending. Petitioner was unable to proceed with the case, including the amending of his complaint, because he was deprived of full and complete discovery. Defendants failed to comply with the subpoena *duces tecum* (Supp. App. Ct. of Appeals PP. 9-11) and the district court refused to enforce its order of October, 1963, which required the production of documents.

3. In footnote 6 to paragraph 3 of their argument, respondents state that the *in camera* inspection of documents by the district court was "to afford the court the opportunity to consider the request for discovery-not to decide the case upon the basis of such inspection". The one hundred page decision of the district court (App. Ct. of Appeals PP. 30-131) shows that the court determined and decided, among other matters:

a. That account No. 35 showing a deficit of $19,000.00 belonged to petitioner;

b. that petitioner had deficits in his account;

c. that petitioner consistently incurred losses during the year 1958; and

d. that petitioner had a deficit in his account in the sum of $52,950.75 at the end of 1959.

By the denial of discovery of documents specified in his subpoena *duces tecum* and other documents referred to in paragraph 1 of this supplement, petitioner was foreclosed from proving that the decision by the court was based on fraudulent documents.

Respectfully submitted,

BERNHARD ROSEE
*Petitioner, Pro se*

SUPREME COURT, U. S. **No. 763**

JAN 13 1969

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*Respondents.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

## SECOND SUPPLEMENT TO REPLY TO PETITIONER

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IN THE

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*Respondents.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

## SECOND SUPPLEMENT TO REPLY TO PETITIONER

Now comes the petitioner, pro se, and respectfully moves this Court for leave to file a second supplement to his

Reply brief for the reason that petitioner inadvertently omitted certain exhibits necessary for proper presentation of his case:

Petitioner for further reply to respondent's brief states:

Petitioner seeks to amplify his reply to paragraph 3 of the argument made by Respondents. (Resp. brief, p. 9). In paragraph 3, respondents state that there is nothing in the record to show that the order of the district court entered on February 16, 1965, was not complied with. An examination of the record and of the events which transpired on and after February 16, 1965, demonstrates that this is patently untrue.

It appears that on February 16, 1965, the district court refused to require the CEA to produce the daily and periodic reports filed by Baggot & Morrison with the agency and the daily confirmations submitted to the agency by the clearing corporation of the Board of Trade — as Kirby testified (App. Ct. of Appeals pp. 248-250)—because these documents were privileged (Appendix A, App. 1) or because these documents were subject to direct production from Baggot & Morrison (36 FRD 691).

The fact of the matter is that none of these documents was ever produced for petitioner's inspection by the CEA (or by the clearing corporation). The only exhibits supplied by the government to petitioner for examination are specified in the list of exhibits filed in the district court by the United States Attorney (Appendix B, App. 2) and in the list of exhibits submitted by petitioner to the lower court (Appendix C, App. 3).

The daily and periodic reports and the daily confirmations, mentioned above, which are vital and relevant to petitioner's case were withheld from petitioner. The dis-

trict court decided that duplicates of the documents in the possession of the CEA could be obtained directly from those who prepared and filed them, i.e., Baggot & Morrison and the clearing corporation (36 FRD 691). The court failed to understand that the documents produced by Baggot & Morrison had been forged, altered, falsified and manipulated and that petitioner could establish the true status of his account ONLY from the documents in the possession of the CEA and the Clearing House Corporation of the Board of Trade.

Congress never intended in the Commodity Exchange Act to prevent a litigant from obtaining records indispensable to proving the commitments resulting from all his transactions on the Board of Trade. One of the purposes of the CEA was to prevent cheating and defrauding of the public, including petitioner, by commission merchants.

*Did the court act arbitrarily and contrary to Section 1.5 of the CEA in denying petitioner these records from the Commodity Exchange Authority (CEA Sec. 1.5, Appendix D. App. 7). This honorable court should decide this question which has never been adjudicated.*

Petitioner's Subpoena *Duces Tecum* served on the C. E. A. and the clearing corporation of the Board of Trade in October, 1963 (App. Ct. of App. pp. 9-12) clearly specified all the foregoing documents. Yet neither the C.E.A. nor the clearing corporation of the Board of Trade complied.

The requirement that petitioner specify particular dates with respect to daily and periodic reports in the court's ruling of February 16, 1965 deprived petitioner *of his ability to show* his daily commitments and balances during the relevant period. (36 FRD 691).

The court in its opinion, states "that cancelled checks were examined" and "that daily segregation statements were examined." (App. Ct. of Appeals, p. 125), but certainly not by petitioner. Petitioner was deprived of his right to inspect and examine these documents which would have disclosed the fraud perpetrated on petitioner and exposed the true ownership of accts. No. 35 and No. 45 (See definition of segregated account (Com. Exch. Act. Sec. 1.32, Appendix E, App. 8).

On May 18, 1965, the court abruptly ordered discovery closed (App. Ct. of Appeals, pp. 23-24), before petitioner had an opportunity to gain access to relevant records.

Petitioner respectfully prays that this Honorable Court decide that none of the documents listed in petitioner's Subpoena Duces Tecum is privileged and that petitioner was denied proper discovery. Petitioner further prays that the Court grant such relief as may enable him to resume his occupation and earn a livelihood.

Respectfully submitted,

BERNHARD ROSEE
*Petitioner, Pro Se*

## APPENDIX A

2-16-65 Docket, United States District Court for the Northern District of Illinois, No. 63 C 1348

2/16/65 Filed Opinion.

Pursuant to opinion this day filed Court orders the production pursuant to the subpoena duces tecum served by the plaintiff, Bernhard Rosee, on Roger E. Harper and filed with the Clerk of this Court on May 21, 1964, certain documents as specified in draft order. Court refuses to order production of the documents, as specified in draft, on the ground that they are privileged or irrelevant and vacates its order of August 24, 1964 denying the motion of Roger E. Harper to quash the aforementioned subpoena with respect to said documents.—Draft—Will, J.

## APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| BERNHARD ROSEE, *Plaintiff,* | ) | |
| vs. | ) | NO. 63 C 1348 |
| BOARD OF TRADE, et al. *Defendant.* | ) | |

LIST OF EXHIBITS

EXHIBIT A — Report of Examination of Baggot and Morrison, submitted by Albert W. Kibby to the Commodity Exchange Authority on November 26, 1958.

EXHIBIT B — Certified record of proceedings in C.E.A., Docket No. 43 before the United States Department of Agriculture.

EXHIBIT C — Report of Examination of Baggot and Morrison, submitted by Clarence B. DeWitt to the Commodity Exchange Authority on May 26, 1959.

EXHIBIT D — Report of Audit Assignment No. 1998-D of Baggot and Morrison, submitted by G. E. Piala to the Commodity Exchange Authority on April 7, 1960.

EXHIBIT E — Report of Audit Assignment No. 1998-D of Baggot and Morrison, submitted by Clarence B. DeWitt to the Commodity Exchange Authority on April 8, 1960.

EXHIBIT F — Examination file of the Complaint of A. L. Schiffman against Baggot and Morrison.

EXHIBIT G — Investigative File No. 60-44 and Complaint of A. L. Schiffman against Baggot and Morrison.

EXHIBIT H — Additional records relating to the Complaint of A. L. Schiffman against Baggot and Morrison.

EXHIBIT I — Investigation of Complaint of Bernhard Rosee of November 1, 1960.

File relating to Audit Assignment 1998-B, relating to Baggot and Morrison.

File of Audit Assignment No. 1998-C, relating to Baggot and Morrison.

File of Audit Assignment No. 1998-D, relating to Baggot and Morrison.

Supplemental Report of Audit Assignment No. 1998-D, relating to Baggot and Morrison.

Supplemental Report Work Papers relating to Audit Assignment No. 1998-D, relating to Baggot and Morrison.

*Edward V. Hanrahan*
Edward V. Hanrahan
United States Attorney

EIK:mam

## APPENDIX C

PLAINTIFF'S EXHIBITS IN SUPPORT OF BRIEF IN OPPOSITION TO MOTION OF CERTAIN DEFENDANTS KIBBY & GORDON TO DISMISS OR AMM. JUDGMENT

*GR. 1*

1. Letter from Schiffman to B & M dated 3/16/59
2. Check $3,000.00 from Schiffman to B & M dated 3/16/59

3. Letter from Schiffman to B & M dated 6/22/59
4. Check $3,000.00 from Schiffman to B & M dated 6/22/59
5. Memo card (B & M) — Ole Schiffman 6/23/59 "Acct. #2"
6. Letter 1/1/60 from B & M (Haywood) to Schiffman re loss
7. Letter 7/20/60 from T. W. Miller to CEA
8. Letter 8/15/60 from Caldwell (CEA) to Miller
9. Notation 9/3/60 by Ole Schiffman re B & M
10. Affidavit Brandt dated 6/7/65
11. Schiffman ledger sheets

*GR. 2*

1. B & M check 8/17/59 (?) to Rosee — $8,000.00
2. B & M bank statements — Continental Bank
3. B & M check to B & M 8/10/59 — $5,000.00
4. B & M check stubs — Continental Bank — 3 sheets
5. B & M check to Rosee 9/17/59 — $7,000.00
6. B & M ledger sheet — "Rosee a/c"
7. Letter from Rosee to B & M (m) dated 11/5/59
8. Group of 7 B & M checks

*GR. 3*

1. Four B & M ledger sheets (Schulman) and 3 sheets (Rosee)
2. Letter B & M 1/1/59 to Schulman
3. Letter Schulman 1/6/59 to B & M
4. Letter B & M 1/7/59 to Schulman
5. Check of B & M to Rosee 9/5/58 — $250.00
6. B & M "Comparison of Customer Deficit" etc. 10/31/58

*GR. 4*

1. CEA worksheet prepared by Kibby 11/14/58 and position of holdings (B & M) containing 21 sheets

*GR. 5*

(unnumbered: "Pl. ex. GR. 5). Five pages relating acct. 35 (CEA)

1. Single CEA shee showing positions
2. Memo B & M — Rosee 9/19/59
3. TC — Morrison
4. B & M worksheet (not original)
5. 
6. TC (acct. 35)

7, 8.— CEA forms 203

9. B & M TC dated 9/23
10. B & M worksheets (Sept. 22-23)
11. CEA worksheet: "B & M — Rosee positions"
12. B & M memo & C. 9/30/59
13. CEA office memo from Diala to Caldwell
14. CEA — 2 sheets showing Alphab. arrange. accts.
15. Final deposition
16. B & M — 2 sheets re act. 35 (P & S)
17. B & M "No. 1282" P & S
18. Decision of arbitration committee
19. Bank statements of B & M (3 pages)

(NOTE — 201 reports 9/21-9/22 appear in this group but are not numbered and were presented to the court)

(NOTE — same comment as above re Kibby report to Caldwell dated 11/26/58).

*GR. 6*

1. Harper memo to file 10/14/60
2. Jacob affidavit — 6/7/65 and exhibits
3. Teletype messages — Caldwell — Kibby
4. Position journal —"Bust — went acct. 35"
5. Ledger sheets re acct. 35

*GR. 7*

1. B & M check to Security Benefit 11/19/59 — $250.00 and $1,292.84 12/11/59 and accompanying ledger sheet
2. Piala & Dewitt interview of B & M — doc dated 4/7/60 and Piala report to Caldwell dated 4/7/60
3. Letter 1/6/61 Quinn to CEA (Gordon)

*GR. 8*

*GR. 9*

B & M position journal & statement — acct. 35

*GR. 10*

Govt. worksheet B & M — Rosee and ledger sheet re "special account" (Ledger numbered 10-1)

*GR. 11*

(and 11-1) Eight TC and Report Dewitt of 5/26/59

*GR. 12*

Group of letters, telegrams and newspaper article relating to Rosee's request for investigation B of T

*GR. 13*

(unnumbered) Letter Rosee to B & M 12/17/59 in possession of govt.

13-2: Investigation CEA of Rosee comp.

13-1: Group (5 pgs) B & M ledger sheets relating to Rosee's accounts

"Addendum"

Plaintiff's reply exhibits — filed 11/4/65.

*Pl. Rep. Ex. 1*

Letter from Rosee to CEA (Harper) — 7/12/62
Letter from Caldwell to Rosee — 7/17/62

2. B & M checks:

| *Date* | *Payee* | *Amount* |
|---|---|---|
| 8/ 7/59 | Rosee | $ 8,000.00 |
| 8/10/59 | B & M | 5,000.00 |
| 9/17/59 | Rosee | 7,000.00 |
| 9/17/59 | B & M seg. acct. | 20,000.00 |

3. B & M trading cards: 9/23/59, 9/29/59, 10/8/59, 10/26/59 and related P/S forms
4. Group of 7 BM TC relating to acct. 35 or 45 and related P/S forms
5. Letter Rosee to B & M dated 6/27/60
   Letter Rosee to Lebeck dated 9/9/60
   Letter Lebeck to Rosee dated 9/13/60
6. A-1 memo card Rosee holding 11/6
   A-2 through A-6 incl.— Various B & M Ledger-sheets

## APPENDIX D

### EXHIBIT 4

Sec. 1.5 Information confidential; disclosures to contract-market committees and officials. No officer or employee of the Department of Agriculture shall publish, divulge, or make known in any manner, except insofar as may be required in the performance of his official duties or by a court of competent jurisdiction, any facts or information regarding the business of any person which may come to the knowledge of such officer or employee through any inspection or examination of the reports or records of, or through any information given by, any person pursuant to the Commodity Exchange Act or these rules and regulations: *Provided, however,* That this prohibition shall not apply to disclosures made in good faith to the Business Conduct Committee or other proper committee or official of a contract market of matters in respect to which such

contract market has responsibility or duty under the Commodity Exchange Act, or which, in the judgment of the Act Administrator, adversely affect such market or are prejudicial to the interests of producers or consumers.

## APPENDIX E

Sec. 1.32 Segregated account; daily computation and permanent record. The amount of money, securities, and property which must be in segregated account in order to comply with the requirements of section 4d (2) of the Commodity Exchange Act shall be computed by each futures commission merchant as of the close of the market each business day, based upon his accounting records. A permanent record of such computation shall be made and kept in readily accessible form, together with all supporting data.

SUPREME COURT, U. S.

IN THE

# Supreme Court of the United States

OCTOBER TERM 1968

Office-Supreme Court, U.S.
FILED
FEB 14 1969
JOHN F. DAVIS, CLERK

No. 763

**BERNHARD ROSEE,**

*Petitioner*

v.

**BOARD OF TRADE OF THE CITY OF CHICAGO,** an Illinois corporation; **JAMES E. BAGGOT, JR.,** and **DONALD W. MORRISON,** individually and d/b/a **BAGGOT & MORRISON; HARRIS HAYWOOD; SIDNEY C. HAMPER, MARTIN H. MILEK, ROY C. LOFTUS, RICHARD ROSE, RAYMOND COMENZO,** and **THOMAS HERR,** individually and as members of the Committee of Arbitration of the Board of Trade of the City of Chicago; **JULIUS MAYER; WILBERT E. HUGE; ROBERT L. DAVID; THOMAS E. HOSTY; ROBERT C. LIEBENOW,** individually and as President of the Board of Trade of the City of Chicago; **WARREN W. LEBECK,** individually and as Secretary of the Board of Trade of the City of Chicago; **JAMES J. COUGHLIN; ALBERT W. KIBBY;** and **SAM GORDON,**

*Respondents*

**~~MOTION FOR LEAVE TO FILE~~ PETITION FOR REHEARING OF ORDER DENYING CERTIORARI AND PETITION FOR REHEARING**

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IN THE

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BERNHARD ROSEE,

*Petitioner*

v.

BOARD OF TRADE OF THE CITY OF CHICAGO, et al.

*Respondents*

## PETITION FOR REHEARING OF ORDER DENYING PETITION FOR CERTIORARI

Petitioner prays that this Court grant rehearing of its order of January 20, 1969, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit in the above-entitled case (Pet. for Certiorari, App. 4-5).

### 1. The Relevant Facts

Focusing the issue requires stripping the facts to essentials. Petitioner, a commodities trader, sued in the Circuit Court of Cook County, Illinois, alleging that he had been defrauded by the brokerage house of Baggot and Morrison and that the Board of Trade of the City of Chicago, its arbitration committee and Commodities Exchange Authority

agents Kibby and Gordon, were parties to a conspiracy to conceal the fraud (App. 1-14, 30-31, 33-34). The alleged modus operandi of the fraud was to induce petitioner to execute trades on behalf of Baggot and Morrison (saving the brokers' commission), some of which Baggot and Morrison would eventually charge to Rosee's account if unprofitable, or to their own house account, or the account of others, if profitable (App. 117, 127).

The entire scheme having been concealed from petitioner (App. 41),[1] his claim could be proved or disproved only by comparison of Baggot and Morrison's ledgers and records over the entire period from January, 1958 to November, 1960, with their daily transaction reports to the Commodity Exchange Authority (CEA) over that period (App. 118). The Commodity Exchange Act,[2] Sections 1.32, 1.35, 1.37, 17.00, and regulations promulgated by the Secretary of Agriculture pursuant to Section 12 thereof, require that these reports, reflecting the account of each trader by name, be filed with the CEA each trading day. See *Freeman v. Seligson,* F.2d , No. 20,478, App. D.C., decided June 28, 1968, slip op., p. 3.

Kibby and Gordon removed the case to the United States District Court and moved to dismiss as to themselves on the ground of official immunity. The other defendants moved for remand to the state court on the ground that, with Kibby and Gordon out of the case, the predicate of federal jurisdiction fell (App. 30-32).

The District Court held that "the legal defenses relied upon by the government are insufficient to warrant dismissal as a matter of law" (App. 32, 98-103), and therefore denied

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[1]The District Court found that Rosee did not, but "should have received daily advices from Baggot and Morrison" (App. 49, n. 1).

[2]49 Stat. 1491, 7 U.S.C. § 1 to 17 a.

the motions to dismiss and to remand. The Court also rejected the Government's claim that the daily transaction reports filed with CEA, which plaintiff had subpoenaed, were privileged (35 F.R.D. 512; 36 F.R.D. 684, 687, 688, 691). Accord: *Freeman v. Seligson,* F.2d , No. 20,478, App. D.C., decided June 28, 1968 (Leventhal and Bazelon, JJ.).

On the basis of *in camera* inspection of three random daily reports which had been submitted to the Court by CEA (Brief for the Government in Opposition, p. 9), the Court, on February 16, 1965, over the Government's vigorous opposition, ordered CEA to produce the daily reports for relevant dates which, the Court assumed, petitioner would be able to specify after he had completed discovery of other documents the Court ordered produced (36 F.R.D. at 691). Production was ordered of the daily transaction reports "subject to the requirement that plaintiff specify particular dates shown to be relevant" (*ibid.*).

Before petitioner completed discovery of the other documents, and before petitioner had specified any dates as required (Supp. App. 95-98; 102, fol. 23-24), the Court, *sua sponte,* on May 18, 1965, ordered "discovery on the question of jurisdiction closed" (App. 24).[3] On June 9, 1965, Kibby and Gordon filed a motion for summary judgment (App. 17-22), which the Court granted on June 13, 1966 (App. 29). The court then concluded "that the principles of limited federal jurisdiction require * * * remanding the balance of this case to the state court" (App. 131) and entered a remand order (App. 30). The Court of Appeals held this disposition "supported by * * * the law appertaining thereto" (Pet. for Certiorari, App. 4).

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[3] Assertion in the Government's Brief in Opposition, p. 9, that "There is nothing to show that this order was not complied with" is misleading, because compliance was not required until the condition precedent was satisfied. There is nothing to suggest that petitioner was afforded opportunity to, much less that he did, satisfy the condition.

The District Court apparently closed discovery on "the question of jurisdiction," *i.e.*, the merits of the claim against Kibby and Gordon, on the theory that the uncompleted discovery could not affect resolution of that question (App. 98-103). The Court appears to have assumed that the merits of the claim against Kibby and Gordon were so discrete from the merits of the basic fraud charge that the former could be adjudicated without reaching the merits of issues involving the latter (36 F.R.D. 684, 687, 689; Supp. App. 99, Supp. App. 102, fol. 25-26; App. 98-103). The Court noted that discovery thus far "has disclosed only a small portion of the information which must be explored before each of the many charges of improper conduct by the other defendants can be resolved to any degree of certainty" (App. 33, 131).

However, the Court's exhaustive opinion, while purporting to eschew adjudication of the merits of the fraud claim (App. 54, 62, 104-105), actually does consider and adjudicate essential elements of that claim.[4] Throughout the

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[4] Thus, the District Court found that "during October, 1959, in particular, Rosee's open trades were suffering substantial losses resulting in deficits which continued to mount * * *" (App. 38, n. 2); "Baggot and Morrison permitted Rosee to maintain his open trading position in the face of substantial potential deficits" (*ibid.*); "In point of fact, Rosee [on August 7, 1959] * * * had absolutely nothing" (App. 52); "Rosee's own accounts continued to have a deficit balance" (*ibid.*); "The trade [in "Account 45" on September 14, 1959] was * * * treated [by Baggot & Morrison] as a customer's trade rather than a 'house' trade" (App. 54); "It is equally possible to infer that the Baggot and Morrison employees preparing the position journal included the Account # 35 trade on Rosee's sheet because they understood that this was Rosee's account" (App. 58); "On * * * [October 1], Rosee executed several trades in the # 35 account" (App. 59) (Rosee's contention being that he executed these trades at the request and on behalf of Morrison) (cf. App. 63, par. IV-31, last two lines); the transactions in Account # 35, "undeniably involve[d] Rosee's account" (App. 61); "Rosee had some knowledge of Account # 35" (App. 62); "While the # 35 was added by someone in Baggot and Morrison's office, there is no

opinion, in this context, inference and speculation substitute for findings based on evidence which could have been obtained only through, and after, discovery.[5]

The opinion, moreover, explicitly recognizes that disposition of the Kibby and Gordon motion for summary

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suggestion that the trade was intended to be made in Rosee's *regular* account * * * " (App. 64) (emphasis added); Rosee's "statements to Piala regarding * * * his belief that the Regular Account deficit was $28,000 are somewhat confusing" (App. 74); "The alleged impropriety of the losses from the November, 1959 liquidation of plaintiff's open position (IV-31) arises only because of the second false assumption made by Rosee: that he had a credit of $75,000 plus in his account in September" (App. 106); "That Rosee could have believed that he had $20,000 (or more) in his accounts when he had exhausted almost all of the credit in his drawing account from 1958 and had consistently incurred losses in trading (IV-8, 11) is somewhat beyond belief" (App. 112).

[5] For example, "The absence of some of these documents may indicate no more than sloppy bookkeeping" (App. 49, n. 1); the available evidence "could indicate that Rosee made the trade or it could indicate that Morrison made the trade, advising Fritz that it was on behalf of Rosee" (App. 54); "It is, of course, apparent that [Baggot and Morrison's] dereliction with regard to '03 reports is inconsequential in determining ownership [of account #35]" (App. 55); "This analysis, of course, assumes that Baggot and Morrison did not cancel the '03 report (and fail to file one on the 14th) for other reasons * * * " (App. 58); "This is apparently the first time Rosee's name was placed on any trading record concerning Account #35" (App. 59); "From the records before the court, the details of trading in Rosee's regular account cannot be determined precisely" (App. 60); these facts "appear to suggest that Rosee had some knowledge of Account #35" (App. 62); "This is not to say that Account #35 in fact belongs to Rosee * * * " (App. 62); Rosee "may have known that his account included debits in these amounts or have been advised of his Regular Account balance as of November 9 which included these debits" (App. 74).

judgment necessarily required consideration of the validity of petitioner's charges against Baggot and Morrison, in part, at least:

> "* * *while the pending motion does not involve the charges levied against Baggot and Morrison, the court is necessarily put to the task of evaluating Rosee's reasoning as to some of the charges levied against them * * *." (App. 104).

This evaluation was made despite the fact that petitioner had been foreclosed from establishing the validity of his basic position by discovery.

The District Court assumed that 28 U.S.C. §1441(c) posed no obstacle to bifurcation of plaintiff's discovery and that adjudication of the merits of the claim against Kibby and Gordon left only a discretionary question, namely, whether the "substantial commitment of judicial resources" justified "retention of the case against the seventeen other defendants" (App. 131). Actually, a quite different, and far more serious question, of constitutional dimensions, is presented.

As we have seen, the District Court found that the merits of the claim against Kibby and Gordon could not be adjudicated without considering and evaluating, in part at least, the validity of plaintiff's claim against Baggot and Morrison. The court proceeded to make that evaluation without having accorded plaintiff the benefit of discovery of documents in the exclusive possession of the CEA which were not merely relevant but indispensable to establishment of his position. For the same reason that "a conviction should not stand when the accused has been denied access to documents relevant to his defense" (*United States v. Grayson*, 166 F.2d 863, 870 (2 Cir.)), a judgment may not stand which entails findings adverse to a party on issues as to which he has been denied discovery of unprivileged material crucial to his underlying claim.

## 2. Questions Presented

Whether removal procedure permits bifurcation of the merits of a single "case," so as to compel the plaintiff to litigate his claim piecemeal, without the benefit of discovery essential to evaluation of his underlying claim, where at least partial evaluation of that claim is indispensable to adjudication of the "jurisdictional" facet.

## 3. Reasons For Granting the Writ

This Court has recently reemphasized "that 'the whole tendency of our decisions is to require a plaintiff to try his whole cause of action and his whole case at one time.'" *Mine Workers v. Gibbs*, 383 U.S. 715, 723, 725, n. 13. It is certainly inconsistent with that tendency for a federal court to *forbid* the plaintiff "to [discover] his whole cause of action and his whole case at one time." *Armstrong Co. v. Nu-Enamel Corp.*, 305 U.S. 315, 325.

Where, as here, segregation of issues at the discovery stage results in a partial adjudication which necessarily entailed consideration and evaluation of issues as to which discovery was foreclosed, the plaintiff is deprived of opportunity to try his case at one time in either the federal or the state court. Piecemeal adjudication of the merits on bobtailed discovery is bad enough; where, as here, adjudication plainly impinges upon the issues remanded for trial to the state court, the ramifications of *res judicata* (*Gibbs* case, *supra*, 383 U.S. at 724), foreclose the possibility of fair trial of plaintiff's case in the state court.

Having overruled the Kibby-Gordon motion to dismiss for official immunity, the District Court was forbidden, both by the trend of this Court's decisions, and by due process considerations, to separate the *merits* of petitioner's claim against Kibby and Gordon from the *merits* of his claim against Baggot and Morrison and others, at least before

discovery was completed. Remand after partial adjudication of the merits without full discovery deprived petitioner of the right to a fair trial, not only of Kibby and Gordon, but, even more importantly, of the remaining defendants.

The implications of pendent jurisdiction are intricate and complex. This case demonstrates that clarification by this Court is essential to assure that the broad discretion vested in the lower courts thereunder will be exercised consistently with the trend of this Court's decisions and overriding due process limitations.

## CONCLUSION

For the reasons set forth above, it is respectfully urged that rehearing be granted, and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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## CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

*Counsel for Petitioner*